

31683
EB

SERVICE DATE - OCTOBER 25, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33877

ILLINOIS CENTRAL RAILROAD COMPANY—CONSTRUCTION AND OPERATION EXEMPTION—IN EAST BATON ROUGE PARISH, LA

Decided: October 18, 2001

By petition filed on November 29, 2000, Illinois Central Railroad Company (IC or Petitioner) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10901 in order to construct and operate a line of railroad (the Line), approximately 3.2 miles in length, in East Baton Rouge Parish, LA. The Line would connect IC's Maryland Industrial Lead with the Baton Rouge Polyolefins (BRPO) plant of ExxonMobil Chemical Company (ExxonMobil).

On December 19, 2000, The Kansas City Southern Railway Company (KCS) filed a reply to the petition, to which IC responded on January 8, 2001.¹ In a decision served on March 9, 2001, we instituted a proceeding under 49 U.S.C. 10502(b) to consider the proposal.² As IC has requested, we will now grant a conditional exemption from the requirements of 49 U.S.C. 10901 for construction of the line. We will issue a final decision after completion of the environmental review process, making the exemption authority effective at that time, if appropriate.

BACKGROUND

IC, a wholly owned subsidiary of the Canadian National Railway Company (CN), is a Class I rail carrier that owns and operates approximately 2,550 miles of rail line in 6 midwestern and south central states. In order to expand and enhance the service and rate options available to ExxonMobil, IC proposes to construct and operate a new rail line between its Maryland Industrial Lead (extending 29 miles north from Baton Rouge to Zee, LA) and the BRPO plant. The proposed build-in would extend from a connection at approximately milepost 359.4 on the

¹ Congressional inquiries were received from U.S. Senators John Breaux and Mary L. Landrieu and Congressman Richard Hugh Baker. Letters were received from M. J. "Mike" Foster, Jr., Governor, State of Louisiana; Tom Ed McHugh and Bobby Simpson, Office of the Mayor-President, City of Baton Rouge, LA; Councilman-Elect Ulysses Z. Addison, Jr.; and several residents of Baton Rouge.

² By decision served May 25, 2001, Board Secretary Williams denied a KCS motion to compel IC discovery responses and for a declaration of admissions. By decision served August 21, 2001, we denied a KCS appeal of the Secretary's decision.

Maryland Industrial Lead in a generally northwesterly direction to the western boundary of the plant. The build-in would involve crossing a single KCS track at grade approximately 1,300 feet south of Thomas Road, south of the plant.³ The single-track, unsignaled line would be constructed entirely on right-of-way to be acquired by IC for this project and would be maintained to Federal Railroad Administration Class 2 standards. IC states that ExxonMobil would be responsible for constructing track connections within the plant necessary to facilitate IC's entry into the plant. IC projects that, upon completion of the construction project, it would serve the facility once daily, 7 days a week.

IC claims that its proposed western approach to the plant, and the planned service patterns on the line, would eliminate any overlap or interference between its proposed operations and the existing operations of KCS at the plant. IC adds that the proposed line could provide two other rail shippers that are currently being served exclusively by KCS with direct access to IC rail service—Deltech Corporation, a styrene processor, and Dravo Lime, a processor of lime products.⁴

IC states that ExxonMobil's BRPO plant is one of the world's largest producers of high-density polyethylene and polypropylene plastics. The plant generates an average of approximately 35 carloads of outbound plastic pellets daily and receives approximately 15 tank cars monthly of solvents used in the manufacturing process. The total production capacity of the plant is now approximately 2.6 billion pounds of plastics annually. Approximately 90% of the plant's current production is shipped in plastic pellet or granular form in covered hopper cars furnished by ExxonMobil to distribution terminals and plastic molding plants throughout North America. The plant's transportation facilities are located generally on the north side of the plant, and are served directly only by KCS. Although IC has commercial access to the plant via reciprocal switching, it alleges that KCS's present switching charge—\$715 per car for IC—effectively precludes any meaningful participation by IC in the traffic. According to IC, ExxonMobil supports its proposed construction and operation on the expectation that it would bring additional rail storage facilities, more competitive rail rates, production efficiencies, and better, alternative, direct transportation service.

DISCUSSION AND CONCLUSIONS

³ On July 16, 2001, IC filed a related petition in STB Finance Docket No. 33877 (Sub-No. 1), Illinois Central Railroad Company—Petition for Crossing Authority Under 49 U.S.C. 10901(d), seeking authority under 49 U.S.C. 10901(d) to cross the KCS track. In a separate decision being issued in that docket concurrently with the present decision, we have denied KCS's motion to dismiss the crossing petition and have established a procedural schedule to develop the record in that proceeding.

⁴ IC indicates that it would be up to these industries to construct the necessary track connections on their property to obtain access to IC's service.

The construction and operation of a new railroad line requires prior Board approval under 49 U.S.C. 10901. Under 49 U.S.C. 10502, however, we must exempt a transaction or service from regulation when we find that: (1) continued regulation is not necessary to carry out the Rail Transportation Policy (RTP) of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope or (b) regulation is not necessary to protect shippers from the abuse of market power.

KCS objects to the requested exemption as inconsistent with the RTP of 49 U.S.C. 10101. Alternatively, KCS asserts that the Board should either require IC to file an application under section 10901 or institute further proceedings pursuant to 49 U.S.C. 10502(b).

KCS's primary argument is that there is no legitimate public need for the proposed line because IC already has commercial access to the plant via a KCS reciprocal switch. According to KCS, there is no reason that IC cannot get as much business as it wants from the plant—even under the current reciprocal switch fee—without building a redundant and, in its words, “environmentally questionable” line that would mean a new at-grade crossing of U.S. Highway 61. KCS further argues that the proposed construction is not needed for efficient, reliable, or competitive service to BRPO, and claims that ExxonMobil's transportation costs have actually declined in recent years. KCS asserts that what IC proposes to build would be excess capacity at a location that is already adequately served, and that the added capacity would work to the detriment of the railroads involved and the public. Specifically, KCS contends that, if the line that IC proposes to build reduces the volume of cars that KCS handles for the BRPO, KCS would have to consider paring back its facilities to a level that is economically viable.

KCS also argues that ExxonMobil has not shown that it is a captive shipper, and that IC has not submitted specific information addressing: (1) any studies, discussions, or consultations IC has had with other industries relative to service for those industries; (2) ExxonMobil's need for rail car storage; (3) whether or not IC or ExxonMobil plans to construct car storage facilities in the area; (4) current service capacity and past service problems; and (5) the environmental and safety issues that may be involved here.

IC responds that this proposal is for a pro-competitive build-in, and that under the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), there is now a presumption that the Board should approve construction projects. IC challenges KCS's claim that Petitioner has adequate access now to the BRPO plant, asserting that the current KCS switching charge of \$715 per car is too high and that, as a result, IC originated less than 2% of overall plant traffic in 2000. IC further points out that all environmental and safety concerns will be fully evaluated by the Board before final construction authority is granted.⁵ Finally, in light of

⁵ In any event, IC asserts that there are no potentially significant environmental or safety problems here because: (1) the line would not be located in close proximity to any residential
(continued...)

increasing traffic at the plant, IC argues that access to a second direct carrier is absolutely critical to ExxonMobil's transportation needs.

KCS's arguments do not raise issues that require denial of the exemption, or that require us to conduct a full-scale licensing proceeding under section 10901. Many of KCS's allegations appear to be based on a belief that IC bears a burden of proving a "public need" for its proposed construction and operation. However, it is well settled that a showing of public need is not a prerequisite under 49 U.S.C. 10901 and 10502. See, e.g., Dakota, Minnesota & Eastern Railroad Corporation Construction Into The Powder River Basin, STB Finance Docket No. 33407 (STB served Dec. 10, 1998), slip op. at 15-16.

We also reject KCS's argument that this construction request must be denied because ExxonMobil has not been shown to be a captive shipper. Nothing under section 10901 requires a shipper to prove that it is captive to a particular rail carrier before it may support a construction project that would result in enhanced competition. Thus, the fact that IC currently has access to the BRPO plant via a reciprocal switching arrangement with KCS is not grounds for denial of this proposal. Indeed, in Kansas City Southern Railway Company—Construction and Operation Exemption—To Exxon Corporation's Plastics Plant Near Baton Rouge and Baker, Louisiana, ICC Finance Docket No. 32547 (ICC served June 12, 1995), at p. 2, a case in which KCS proposed a build-in to another nearby ExxonMobil plant, we rejected a similar argument made there by IC in opposing the construction:

ICR cites no precedent in which the Commission denied a railroad's application to construct a new line because an existing competitor offered a reciprocal switching agreement. Perhaps there could be an agreement so attractive to KCS that it would forego its planned construction. But we see no reason to deny a carrier a construction request it wants simply because it has been offered reciprocal switching under terms it does not want.

Here, IC clearly does not like the terms offered by KCS as part of their current switching arrangement, and wishes to build its own line in order to be able to compete with KCS on different terms. Therefore, we will not deny the former's construction request on the basis of the existence of that agreement.

Long before ICCTA, our predecessor agency, the Interstate Commerce Commission (ICC), found in Gateway Western Railway Company—Construction Exemption—St. Clair County, IL, Finance Docket No. 32158, et al. (ICC served May 11, 1993) (Gateway), and in a series of

⁵(...continued)

areas or public facilities; and (2) there would be no potential for conflicting operations at the plant as IC would serve it from the west (KCS's service is from the east), and IC would switch at different times of the day than KCS.

construction cases cited at n. 12 of that decision, that the RTP favors the construction of new rail lines. Even where another carrier opposes the construction, the ICC, and now the Board, have permitted it, stating “. . . new construction provides additional service to shippers, and in many cases, the kind of additional competition that the rail transportation policy seeks to promote at [former] 49 U.S.C. 10101a(1), (4), and (5).” Gateway, at p. 5.

As in Gateway, the use of the exemption procedure is appropriate here. According to IC, the affected shipper supports the proposed construction, and competition in the affected area should be enhanced. In any event, the RTP does not require that we insulate carriers like KCS here from the competition that would arise from new construction. As the ICC stated in Louisville & Jefferson Co. & CSX Const. & Oper. Jeff. KY, 4 I.C.C.2d 749, 759 (1988):

Improving service to shippers and fostering competition are key elements of the rail transportation policy. Both of these goals will be accomplished under this proposal. P&L is asking us to take an action that would preclude the improved service and the opportunity for economic development that will result from this proposal on the grounds that the new operation may cause it to lose business. Nothing in the rail transportation policy requires us to insulate individual carriers from the pressures of competition. To the contrary, the rail transportation policy directs us to promote competition.

In short, based on the information before us, we conclude that detailed scrutiny of the proposed construction under section 10901 is not necessary to carry out the RTP. We agree with IC that the proposed construction would allow ExxonMobil to receive competitive service from IC. ExxonMobil would also gain access to additional single-line routings, improved gateway routings, and shortened transit times and distances. The requested exemption would promote the RTP by increasing competition [49 U.S.C. 10101(1) and (4)]. Exempting the proposed construction and operation would also reduce the need for Federal regulation, ensure the development of a sound transportation system with effective competition among rail carriers, foster sound economic conditions, and reduce regulatory barriers to entry [49 U.S.C. 10101(2), (4), (5), and (7)]. Nothing in the record indicates that other aspects of the RTP will be adversely affected.

Moreover, a full-scale section 10901 proceeding is not necessary to protect shippers from an abuse of market power. Rather, the proposal would enhance ExxonMobil’s transportation and routing and rate options, and would eliminate ExxonMobil’s existing dependence on a single carrier for its rail service. Given our finding regarding the probable effect of the transaction on market power, we need not determine whether the transaction is limited in scope.

We will not resolve here KCS’s environmental and public safety concerns. Those issues will be addressed in the ongoing environmental review process in this proceeding. We have consistently handled rail construction applications or exemption requests by first considering the transportation issues and later addressing the environmental issues. This approach does not

diminish our capacity to consider environmental matters when we issue a final decision following the completion of the environmental review. Because no construction may begin until our final decision has been issued and has become effective, all environmental matters raised in this proceeding will be fully considered. See Great Salt Lake and Southern Railroad, L.L.C.—Construction and Operation—In Tooele County, UT, STB Finance Docket No. 33824, at p. 5 (STB served Dec. 15, 2000).

Our Section of Environmental Analysis (SEA) issued an Environmental Assessment (EA) in this proceeding on July 20, 2001, with comments due August 20, 2001. SEA will consider all comments received in response to the EA in making its final recommendations to the Board. We will then issue a further decision addressing the environmental issues and making the exemption effective at that time, if appropriate, thereby allowing construction to begin. See Missouri Mining, Inc. v. ICC, 33 F.3d 980 (8th Cir. 1994); Illinois Commerce Com'n v. ICC, 848 F.2d 1246, 1259 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

As conditioned, this action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Under 49 U.S.C. 10502, we conditionally exempt Illinois Central Railroad Company's construction and operation of the above-described line from the prior approval requirements of 49 U.S.C. 10901, subject to our consideration of the anticipated environmental impacts of the proposal and, upon completion of the environmental review process, issuance of a further decision making the exemption effective at that time, if appropriate, thereby allowing construction to begin.

2. Notice will be published in the Federal Register on October 25, 2001.

3. Petitions to reopen must be filed by November 14, 2001.

4. This decision is effective 30 days from the date of service of this decision.

By the Board, Chairman Morgan, Vice Chairman Clyburn, and Commissioner Burkes.

Vernon A. Williams
Secretary